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NO. 84610-1

THE SUPREME COURT

OF THE STATE OF WASHINGTON

FRANKLIN COUNTY SHERIFF'S OFFICE;

FRANKLIN COUNTY CORRECTIONAL CENTER; and

FRANKLIN COUNTY PROSECUTING ATTORNEY'S OFFICE,

Appellants,

vs.

ALLAN PARMELEE,

Respondent.

MOTION TO STRIKE AND ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Appellants, Franklin County et. al., (Franklin County) respectfully requests this Court strike and deny the Respondent's, Mr. Allan Parmelee's, (Mr. Parmelee) Petition for Review (Petition).

ISSUES

I. Should the Petition be stricken for failure to comply with RAP 13.4(f)?

II. Is the Court of Appeals' ruling consistent with the *PAWS*, *Serko*, *Dawson*, and *Koenig* decisions?

III. Does the Court of Appeals' ruling create an "equity exemption" or constrain the Public Records Act?

IV. Does RCW 42.56.565 have retroactive application or affect vested rights?

V. Is RCW 42.56.565 unconstitutional?

STATEMENT OF THE CASE

Mr. Parmelee has submitted approximately eighty (80) public records requests (requests) to Franklin County generally during May through September 2008. (CP 26, 65). Franklin County is a

political subdivision of the state of Washington and "agency" per RCW 42.56.010(1). Mr. Parmelee is presently an inmate in the custody of the state of Washington Department of Corrections as a result of two Arson in the First Degree convictions in 2004. (CP 65). On June 20, 2008, Franklin County filed in Franklin County Superior Court a Petition for Preliminary / Permanent Injunction to enjoin the release of records to Mr. Parmelee pertaining to some of his requests. (CP 64-69). Pursuant to such Petition for Preliminary / Permanent Injunction an Order Granting Permanent Injunction was entered on July 1, 2008. (CP 61-63). At a hearing on October 3, 2008, the trial court set aside the Order Granting Permanent Injunction and issued a Preliminary Injunction enjoining the release of records which remains in effect to date. (CP 40-41). Also at said hearing the trial court found that it could not consider the identity of the requestor, and later affirmed that finding by denying the Franklin Countys' Motion for Reconsideration on February 11, 2009. (CP 9, 40-41). On June 21, 2011 the Division Three Court of Appeals held that the courts could consider the identity of a requestor in an action brought pursuant to RCW 42.56.540 and that

RCW 42.56.565 had retroactive application. Following denial of reconsideration Mr. Parmelee filed a Petition with this Court. Herein Franklin County motions and answers said Petition.

LAW AND ARGUMENT

I. MR. PARMELEE'S PETITION SHOULD BE STRICKEN FOR FAILURE TO COMPLY WITH RAP 13.4(f).

The Petition dated August 15, 2011, excluding appendices, filed by Mr. Parmelee totals at least twenty (20) full pages of single-spaced hand written text. RAP 13.4(f) provides as follows:

> Length. The petition for review, answer, or reply should not exceed 20 pages double spaced, excluding appendices.

Mr. Parmelee's Petition far exceeds the "20 pages double spaced" text requirement since it amounts to 20 pages of single space text. It is likely such 20 pages of single space text equates to 40 pages of double spaced text. Should Mr. Parmelee's overlength Petition be allowed Franklin County is prejudiced in being subject to the RAP 13.4(f) limitation when Mr. Parmelee has not complied. As a result, Franklin County motions this Court to have Mr. Parmelee's Petition stricken in whole or in part as a matter of equity.

II. THE COURT OF APPEALS' RULING IS CONSISTENT WITH THE PAWS, SERKO, DAWSON, AND KOENIG DECISIONS.

Mr. Parmelee argues that a court's balancing of equities in a RCW 42.56.540 action conflicts with, and is rejected by the decisions in Dawson, PAWS, Serko, and Koenig. Dawson v. Daly, 120 Wash.2d 782, 845 P.2d 995 (1993); Progressive Animal Welfare Soc. [PAWS] v. University of Washington, 125 Wash.2d 243, 257-258 (1994); Seattle Times Co. v. Serko, 170 Wash.2d 581, 243 P.3d 919 (2010); Koenig v. City of Des Moines, 158 Wash.2d 173, 184, 142 P.3d 162 (2006). First, Dawson is cited against such on the basis that in applying the former RCW 42.17.255 (now RCW 42.56.050) this Court defined the PRA balancing test as **only** limited to if the public interest was harmed by disclosure more than it was served. Petition at 6; Dawson, 120 Wash.2d 782 (emphasis added). Yet, no where in such decision does it state the Court's review or balancing test is **only** limited to the public interest. (emphasis added). Not only is this contention inaccurate, the Court's analysis in Dawson was specific to a balancing of individual privacy rights versus disclosure

under RCW 42.56.050, not analysis of whether disclosure may not be in the public interest or of damage to persons or governmental functions per RCW 42.56.540. Id. Therefore, the Dawson decision in no way establishes a solely exclusive balancing test that prevents a court from a balancing of equities. Id.

Secondly, the decision in PAWS is cited to claim RCW 42.56.540 is not an independent injunction statute without exemptions and that the PRA has a mandate of full disclosure limited only by exemptions to which the PRA provides. Petition at 7; PAWS, 125 Wash.2d at 257-258. Granted said decision does provide for such. Yet, notably the PAWS decision also identifies that there are exemptions or prohibitions on disclosure of specific information and records outside the PRA exemptions. *Id.* at 258. For example, RCW 7.69A.040 provides for the non-disclosure of child victim or witness information, or RCW 13.50.050(3) providing for confidentiality of records relating to juvenile offenses, or Chapter 10.97 RCW limiting disclosure of non-conviction data, or Chapter 70.02 RCW providing for confidential health care information. None of the aforementioned RCWs are exemptions under the PRA but exist as separate legal basis to exempt specific information or

records from disclosure. This is akin to RCW 42.56.540 in that it also is not an exemption under the PRA, but it provides for a legal basis for records to be enjoined by injunction utilizing the equitable powers of the court. Therefore, as the Court of Appeals found, "[b]ecause injunctive relief is equitable, the PRA specifically allows the court to perform its equitable functions" per common law. Franklin County Sheriff's Office v. Parmelee, 162 Wash.App. 289, 295, 253 P.3d 1131 (2011). This finding by the Court of Appeals is consistent with PAWS in that it merely identifies that the common law provides courts with equitable powers that exist as a legal basis outside the PRA exemptions. 125 Wash.2d 243.

Finally, through citation to Koenig v. City of Des Moines, Mr. Parmelee contends that since in such case the court found the PRA is not be construed in a manner contrary to its unambiguous text that the Court of Appeals' ruling in this case does just that since the legislature has not enacted any equity or balancing test to negate the PRA. Petition at 8; 158 Wash.2d 173, 184, 142 P.3d 162 (2006). Contrary to that opinion, RCW 42.56.540 enacted by the legislature specifically allows for courts to enjoin release of records. Such grant of authority to the courts is unambiguous. It is also established law that a request for injunctive relief invokes the

equitable powers of the courts. Mains Farm Homeowners Ass'n v. Worthington, 121 Wn.2d 810, 815, 854 P.2d 1072 (1993); Hagemann v. Worth, 56 Wn.App. 85, 89, 782 P.2d 1072 (1989). In addition, since this Court has held that judicial power over equity cases, being vested in the courts by Article 4, §§ 1, 6, of the Washington Constitution **cannot be** abrogated or **restricted** by the legislative department, in the absence of contrary constitutional provisions. Blanchard v. Golden Age Brewing Co., 188 Was. 396, 415, 63 P.2d 397 (1936) (emphasis added). It is reasonable to conclude since the legislature enacted RCW 42.56.540 providing for equitable relief it did so knowing and expecting judicial power to be exercised from such, which is not unambiguously provided for in the Public Records Act and therefore not contrary to Koenig. 158 Wash.2d 173.

III. THE COURT OF APPEALS' RULING CONCERNS THE AUTHORITY OF THE COURT, NOT AGENCIES, AND AS A RESULT SAID RULING IN NO WAY RESULTS IN AN EQUITY EXEMPTION OR CONSTRAINS RCWS 42.56.080 AND .100 WHICH APPLY TO AGENCIES.

Mr. Parmelee contends that the Court of Appeals' ruling in this case finding that courts may consider the identity of the

requestor in a 42.56.540 action creates an "equity exemption" that was unauthorized by the legislature and constrains RCW 42.56.080 and .100. Petition at 9-10. Granted it is the legislature, not the courts, that provide for statutory exemptions and no "equity exemption" exists. Such fact is consistent with the Court of Appeals' ruling in this case in that no where does the Court state its ruling intends to or creates an "equity exemption." It is well recognized RCW 42.56.540 is not an independent statutory source of exemptions. PAWS, 125 Wn.2d at 257-258. But, not only are the presence of exemptions necessary under subsection .540, such also requires courts to find whether examination of records would clearly not be in the public interest and would substantially and irreparably damage any person or vital governmental functions. The Court of Appeals' ruling merely acknowledges that in the course of that review, in conjunction with exemptions, that the court may consider the identity of the requestor when evaluating the public interest and harm to persons or governmental functions. The Court of Appeals' ruling is consistent with the dicta referenced by Mr. Parmelee in PAWS stating that the legislature does not want judges' wielding broad exemptions, as again .540 automatically prevents such from occurring since it is not itself an exemption, and

rather is already applied in conjunction with applicable exemptions. Id. at 259-260. In addition, the Court of Appeals' ruling in no way constrains RCW 42.56.080 which requires "agencies" to make public records available and 42.56.100 requiring "agencies" to adopt rules and regulations concerning public records because the Court of Appeals' ruling was specific to the "court" not "agencies." Therefore, Mr. Parmelee's contention that the Court of Appeals' ruling creates an "equity exemption" and is contrary to law is no where stated or supported in the language of the ruling.

IV. BECAUSE RCW 42.56.565 PROVIDES FOR A REMEDY, AN INJUNCTION, IT HAS RETROACTIVE APPLICATION AND DOES NOT AFFECT A VESTED RIGHT.

Mr. Parmelee contends that the Court of Appeals erred in ruling that RCW 42.56.565 applies retroactively because such ruling conflicts with Dragonslayer Inc. v. Washington State Gambling Commission and invalidates vested rights he has in the Public Records Act. Petition at 10-11; 139 Wash.App 433 (2007). RCW 42.56.565 became effective on March 20, 2009. Said RCW

provides for the inspection or copying of public records to be enjoined by injunction. Id. at § 42.56.565(1)(a). In adoption of this RCW it was declared by the legislature in Senate Substitute Bill (SSB) 5130 that

> [t]his act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, takes effect immediately.

2009 c 10 § 2. No where in said RCW or legislative history thereto is it said such law is prospective or retrospective. However, the presumption that a statute applies prospectively is reversed to favor retroactive application if the amendment is remedial and concerns procedure or forms of remedies. Marine Power Equip. Co. v. Wash. State Human Rights Comm'n Hearing Tribunal, 39 Wash.App. 609, 616-17, 694 P.2d 697 (1985). A statute is remedial when it relates to practice, procedure or remedies and does not affect a substantive or vested right. Miebach v. Colasurdo, 102 Wash.2d 170, 181, 685 P.2d 1074 (1984). A vested right entitled to protection under the due process clause "must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to

the present or future enjoyment of property, a demand, or a legal exemption from a demand by another." Caritas Servs. v. DSHS, 123 Wash.2d 391, 414, 869 P.2d 28 (1994) (citing In re Marriage of MacDonald, 104 Wash.2d 745, 750, 709 P.2d 1196 (1985); Godfrey v. State, 84 Wash.2d 959, 963, 530 P.2d 630 (1975)) (emphasis removed). In this instance RCW 42.56.565 provides for a procedure to obtain a remedy, that being an injunction, which are found as requisites by the courts for retroactive application of an amendment in both Marine Power Equip. Co. and Miebach. 39 Wash.App. at 616-17; 102 Wash.2d at 181. In addition, it is obvious that in the adoption of RCW 42.56.565 it was intended for such RCW to be remedial in the legislative declaration that it was for "...immediate preservation of the public peace, health, or safety, or support of state government and its existing public institutions." SSB 5130, 2009 c 10 § 2. As a result, it is logical by the remedial nature of such RCW that it was intended to apply retroactively otherwise it would be ineffective and unable to carryout its purpose of preserving the public peace, health, etc., for all those existing instances in which it was intended to immediately remedy.

Additionally, Mr. Parmelee contends that the Court of Appeals' retroactive ruling concerning RCW 42.56.565 conflicts with Dragonslayer, Inc. where a records requestor was found to have a vested right in financial statements that were requested before a statutory amendment was passed finding such records exempt. 139 Wash.App. at 449. Yet, Dragonslayer, Inc. is not analogous to the present case before the Court in that two significant differences existed in Dragonslayer, Inc. as follows:

1. The legislature had specifically considered, then rejected retroactivity in regards to the statutory amendment (versus no discussion of such in the present case); and
2. The court concluded the statutory amendment was not remedial (versus the present case of RCW 42.56.565 providing for a procedural remedy).

See Id. As a result no conflict exists between the Court of Appeals' finding that RCW 42.56.565 is retroactive and the factually different circumstances and ruling in Dragonslayer, Inc. Id.

In addition, Mr. Parmelee contends by citing In re Detetion of Elmore that because the legislature enacted RCW 42.56.565 to become effective immediately it therefore contains an "emergency clause" and should be considered a prospective statute. Petition at 12; 162 Wash.2d 27, 36 (2007). But, rather such case provides that "[s]uch a clause weighs against retroactivity." Id. Therefore, it

is apparent an emergency clause is not an absolute prohibition to a statutory amendment being retroactive. This is obvious in the fact that this Court found in Elmore that both the fact that an amendment had changed prior caselaw and had contained an emergency clause were a collective basis to find against an amendment being retroactive, in contrast to the present case where RCW 42.56.565 does not change prior caselaw. Id.

Finally, Mr. Parmelee claims error in the Court of Appeals' ruling because it invalidates prior vested rights he has in his public records requests to Franklin County. Petition at 11 and 13. Yet, at the time of Mr. Parmelee's records request to Franklin County RCW 42.56.540 already provided an injunctive remedy. Now, RCW 42.56.565 provides an identical remedy. Both RCW 42.56.540 and .565 provide a basis for agencies to seek an injunction against Mr. Parmelee or another prisoner. Therefore, Mr. Parmelee loses no rights to public records he may previously had by application of 42.56.565 because neither subsections .540 or .565 exempt records from him, rather they merely provide injunctive procedural remedies. Therefore, the Court of Appeals' ruling has no adverse effect on the rights of Mr. Parmelee.

V. MR. PARMLEE'S CONTENTIONS THAT RCW 42.56.565 IS UNCONSTITUTIONAL HAVE BEEN CONSIDERED AND REJECTED BY MULTIPLE COURTS, SUBSEQUENTLY THERE IS NO ERROR IN THE COURT OF APPEALS' RECONSIDERATION DENIAL OR RULING

Mr. Parmelee claims that RCW 42.56.565 violates equal protection, due process, and First Amendment free speech rights in that it is overly vague and broad. Petition at 14. A person alleging a violation of his right to due process must establish that he was deprived of an interest cognizable under the due process clause. Ky, Dep't of Corr. v. Thompson, 490 U.S. 454, 459-60, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989); Bd. Of Regents v. Roth, 408 U.S. 564, 571-72, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). In considering RCW 42.56.565 the Division One Court of Appeals found that Mr. Parmelee provided no authority to show the Public Records Act creates a constitutionally protected liberty interest. King County Department of Adult and Juvenile Detention v. Allan Parmelee, 162 Wash.App. 337, 354 (2011). Again, no authority has been presented in this case that a constitutionally protected liberty interest exists therefore Mr. Parmelee's alleged due process violation should be rejected.

In addition, Mr. Parmelee argues that RCW 42.56.565 violates equal protection by allowing agencies to arbitrarily select or discriminate against "unpopular" prisoners or requestors to deny public records to. Petition at 15. The Fourteenth Amendment to the United States Constitution and article 1, section 12, of the Washington Constitution provide for equal protection under the law. State v. Hirschfelder, 170 Wn.2d 536, 550, 242 P.3d 876 (2010). The appropriate level of scrutiny in equal protection claims depends upon the nature of the classification or rights involved. Am. Legion Post No. 149 v. Dept. of Health, 164 Wn.2d 570, 608, 192 P.3d 306 (2008). The challenged classification need only be rationally related to a legitimate state interest unless it violates a fundamental right or is drawn upon a suspect classification such as race, religion, or gender. Hirschfedler, 170 Wn.2d at 550. A classification passes rational basis review so long as it bears a rational relation to some legitimate end. Id. at 551 (quotations omitted). Under this deferential standard, legislation is presumed to be rational and the plaintiff bears the heavy burden of negating every conceivable basis which might support the legislation. Id. In reviewing whether RCW 42.56.565 violates equal protection the Division One Court of Appeals found that many "rational reasons"

exist for the adoption of such RCW and Mr. Parmelee could not overcome the presumption of rationality when bringing this type of argument. King County, 162 Wash.App. at 360; Petition at 22-23. Subsequently, the aforesaid equal protection argument is insufficient to prevail.

Also, Mr. Parmelee claims that RCW 42.56.565 is unconstitutionally vague, overbroad, and infringes upon free speech. Petition at 16. A statute is unconstitutionally vague only if its terms "are so loose and obscure that they cannot be clearly applied in any context." State v. Sullivan, 143 Wn.2d 162, 183, 19 P.3d 1012 (2001). A statute is overbroad if it chills or sweeps within its prohibition constitutionally protected free speech activities. City of Bellevue v. Lorang, 140 Wn.2d 19, 26, 992 P.2d 496 (2000). In considering the constitutionality of RCW 42.56.565 the Division One Court of Appeals again found that such RCW is not vague, overbroad, or infringing upon constitutional rights, but rather merely creates a procedure to enjoin records under limited circumstances. King County, 162 Wash. App. at 356-58. Division One identified that the U.S. Supreme Court recently noted "the PRA is not a prohibition on speech, but instead a disclosure requirement." Id. at 20 (citing John Doe No. 1 v. Reed, 130 S.Ct. 2811, 218, 177

L.Ed.2d 493 (2010). Therefore, RCW 42.56.565 is not unconstitutional in the context claimed by Mr. Parmelee.

CONCLUSION

Based on the aforementioned facts, law, and argument Mr. Parmelee's Petition should be stricken in whole or in part for violation of RAP 13.4(f), and in addition be denied in its entirety.

DATED this 27th day of October, 2011.

SHAWN P. SANT #35535/#91039
Prosecuting Attorney

By _____
Ryan E. Verhulp, #28902
Deputy Prosecuting Attorney
Attorney for Franklin County et. al.

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Cari L. Domas, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 28th day of October, 2011, a copy of the foregoing was delivered to Respondent, Allan W. Parmelee #793782 Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362, address verified through the Department of Correction's inmate locater website on October 27, 2011, by depositing in the mail of the United States of America a properly stamped and addressed envelope.

Signed and sworn to before me this 28th day of October, 2011.

Notary Public in and for
the State of Washington,
residing at Pasco
My appointment expires:
September 9, 2014